IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE CIVIL JURISDICTION
APPEAL FROM ORDER NO.567 OF 2006
IN
NOTICE OF MOTION NO.1891 OF 2006
IN
S.C. SUIT NO.1474 OF 2000

Alia Begum w/o.Makbool Noor Mohammed ..Appellant
(Orig.Defendant)

Versus

Munir Ahmed Noor Mohammed Meherali .. Respondents
(Orig.Plaintiff)

CORAM : S.R. SATHE,J.
DATED : 28/09/2007

ORAL ORDER :-

1. The appellant-original defendant in S.C. Suit No.1474 of 2000 has preferred this appeal against the order passed by the Judge, City Civil Court, Mumbai in Notice of Motion No.1891 of 2006 whereby the defendant's application to set aside the exparte decree passed against her in Suit No.1474 of 2000 and allowing her to file Written Statement was dismissed. For the sake of convenience hereafter the parties shall be referred to as 'Plaintiff' and 'defendant'.

2. The brief facts giving rise to this appeal are as under :-

The suit property which is consisting of two buildings situated on the land bearing Survey No.275, Hissa No.4 of village Kurla, Taluka : Kurla is owned by

the Trust. Plaintiff's father was initially lessee of the said property. During his life time, father of Plaintiff, bequeathed 15 rooms out of the building to defendant and 15 to Plaintiff. The defendant is the wife of Plaintiff's deceased brother. According to Plaintiff, his father had in fact revoked his Will dated 31/05/1995 and executed an affidavit to that effect on 20/02/1996. Plaintiff's father expired on 02/03/1998 thereafter defendant started dealing in respect of the 15 rooms which were bequeathed to her by Will dated 31/05/1995. Though, the said Will was in fact revoked, the defendant also started inducting tenant in the said room and collecting rent from them. Hence, Plaintiff filed S.C. Suit No.1474 of 2000 for permanent injunction restraining defendant from obstructing Plaintiff's possession of the suit property and recovering rent from the tenants.

3. In the above mentioned suit inspite of service of notice the defendant did not file any Written Statement and the suit proceeded exparte. On 07/02/2006, Plaintiff filed affidavit of evidence and the learned Trial Judge passed exparte decree in favour of Plaintiff on 28/02/2006.

4. It is the case of the defendant that in the month of May-2006, she came to know about the exparte decree passed against her. She, therefore, approached her advocate and filed the present Notice of Motion for setting aside the exparte decree. It is the case of the defendant that she is an illiterate widow struggling hard for her survival. The Plaintiff filed a false and frivolous suit against her with a view to grab the entire property. She had in fact filed her say and affidavit in the said suit and she was unaware of the fact that the suit proceeded without Written Statement.

5. According to her, she had engaged advocate to represent her case. As a result of illness, she was not in a position to attend the Court. She, therefore, submitted that under the circumstances, there was sufficient reason for her to remain absent on the date of hearing and as such exparte decree be set aside.

6. The Notice of Motion was strongly opposed by the Plaintiff. It is contended by the Plaintiff that suit summons was properly served on the defendant No.1. Though she had filed affidavit at the stage of motion she did not file Written Statement and the matter proceeded exparte. Even thereafter the suit was

dismissed and again restored and fresh notice was issued to the defendant but thereafter also she did not file any Written Statement and matter proceeded without Written Statement and ultimately exparte decree was passed against her. According to Plaintiff, as defendant had no case, she did not file Written Statement in the suit and remained absent at the time of hearing. He, therefore, contended that application be dismissed.

7. After considering evidence adduced by both the parties, learned Trial Judge came to the conclusion that though sufficient opportunity was given to the defendant, she failed to file Written Statement. According to him, there was no sufficient evidence to show that at the material time defendant was ill and unable to attend the Court. Learned Trial Judge, therefore, held that defendant has failed to show sufficient cause for remaining absent and as such setting aside the exparte decree. The learned Trial Judge, therefore, dismissed the application for setting aside the decree.

8. The above mentioned order is challenged in the present appeal. In this appeal before me, learned

Advocate for the Appellant-original defendant submitted that even in the affidavit which was filed by the defendant it was specifically mentioned :-

> ***"Without prejudice whatever stated hereinabove rest of the Written Statement is as under"***

9. So, according to him, in the above circumstances, the order passed by the learned Trial Judge to proceed without Written Statement was not legal and correct. Secondly, he canvassed before me that at the time of hearing even the learned Advocate for the defendant was also not present as he was discharged. So, under such circumstances, there was justifiable ground for the defendant remaining absent on the date of hearing. He also submitted that if the exparte decree is not set aside, irreparable loss will be caused to the defendant and as such Notice of Motion be allowed. As against this, learned Advocate for the Plaintiff supported the order passed by the learned Trial Judge. He submitted that though sufficient opportunity was given to the defendant, she deliberately did not file Written Statement. Though, she was aware of the fact that suit has been restored she also did not engage any new advocate. So, there was no justifiable ground to set aside exparte decree and

the order passed by the learned Trial Judge is legal and correct. He, therefore, submitted that the appeal be dismissed.

10. It is an admitted fact that initially defendant was served with the suit summons as well as the Notice of Motion by which the interim relief was sought. Not only that but it is also not in dispute that defendant had filed her affidavit in reply to the Notice of Motion and in that it is mentioned :-

> ***"Without prejudice whatever stated hereinabove rest of the Written Statement is as under"***

11. Ofcourse, if we take into consideration this particular sentence in the light of the entire affidavit, it is difficult to swallow that by the said sentence the defendant wanted to convey that the said affidavit be treated as her Written Statement. However, from the above mentioned facts and circumstances, one thing is certain that this is not a case where the defendant had no intention at all to resist the suit claim. Nor it can be said that she was negligent. On the contrary, at the earlier stage, she had filed affidavit and resisted suit claim and the Notice of Motion. So, on this background, we have to take into

consideration the subsequent events and the conduct of the defendant.

12. It is true that when the defendant was served with the suit summons and the matter is decided exparte, the defendant has to show that there was sufficient reason for her to remain absent on the date of hearing. In the instant case, it does appear that her son some times used to attend the Court. Not only that but it appears that at his instance earlier defendant's advocate Mr.Navalkar was discharged. However, there is nothing on record to show that after he was discharged any new advocate was appointed. Incidentally, it must be noted that admittedly, once the suit was also dismissed for default as the Plaintiff remained absent. However, the said suit was subsequently restored. It does appear that thereafter Notice of the restoration of the matter was issued and the same was served on the defendant. However, there is nothing on record to indicate as to whether defendant was served with the notice prior to the restoration of the suit. In fact, once the suit was dismissed for default, it was necessary to issue notice to other side i.e. defendant and then only pass order regarding restoration of the suit. Unfortunately, there is

nothing on record to show that such course was followed in the instant case.

13. It is pertinent to note that there was one Ballief report stating that order with regard to the restoration was served on the defendant. The learned Trial Judge has again directed the Plaintiff to inform the defendant about the restoration and the date of hearing by RPAD. Though, it is mentioned that accordingly the said order was complied, acknowledgment of the register AD is not on record. Though, the learned Advocate for the Plaintiff was specifically asked to produce the said acknowledgment he has not produced the same. So, under the circumstances the particular direction regarding giving notice to defendant does not appear to have been complied with. So, taking into consideration all these aspects, I think that there was justifiable cause for the defendant to remain absent on the date of hearing. Then, it must be noted that defendant has stated that she came to know about the exparte order in May-2007 and she immediately filed the present application for setting aside exparte decree. So, the facts and circumstances of the case do not indicate that the defendant was negligent in prosecuting her claim or

contentions. We also can not ignore the fact that the defendant is an old illiterate widow claiming right in the suit property which was admittedly secured by her father-in-law. Thus, the real dispute between the parties is in connection with the rights with regard to immovable property. The dispute is between Plaintiff and the wife of Plaintiff's deceased brother. So, taking into consideration all these aspects, I am of the view that there is justifiable cause to set aside the exparte decree. Hence, I pass following order :-

O R D E R

Appeal is allowed.

The order passed on 06/07/2006 by Judge, City Civil Court, Mumbai in Notice of Motion No.1891 of 2006 is set aside.

Notice of Motion No.1891 of 2006 is allowed and exparte decree passed in 1474 of 2000 on 28/02/2006 is set aside.

Both the parties to appear before the Trial Court on 25/10/2007. The Trial Court to give due opportunity to both the parties to lead evidence and dispose of the suit according to law before the end of April-2008.

Under the circumstances of the case, Appellant to pay costs of Rs.1000/- to the Respondent.

(S.R.SATHE,J.)